SUPREME COURT, U.S.
FILED
DEC 8 1970
CLERK

No. 1039

In the Supreme Court of the United States

OCTOBER TERM, 1970

ALBERT TOCCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANNA R. LAVIN
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60610 · (312) 939-0881

INDEX

	PAGE
Opinion of the Court Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions, Statutes, and Rules Involved	4
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	20
Petitioner's Appendix:	
A. Opinion of the Court below	App. 1
B. Order Denying Petition for Rehearing	App. 26

TABLE OF AUTHORITIES

Cases Cited

Aguilar v. Texas, 378 U.S. 108	7, 14
Alderman v. United States, 394 U.S. 165, 171, 174	8, 16, 17, 18
Bruno v. United States, 308 U.S. 287	7, 15
Bruton v. United States, 391 U.S. 123	7, 12
Chapman v. California, 386 U.S. 18	16

PAGE

Goldstein v. United States, 316 U.S. 114 18

Griffin v. State of California, 380 U.S. 609 7
11, 14

Harrington v. California, 395 U.S. 250 16

Kotteakos v. United States, 328 U.S. 750, 764 ..... 7, 11, 16

Lewis v. Oklahoma, 322 U.S. 306, 307 16

Malinski v. People of the State of New York, 324 U.S. 401, 404 ..... 7, 16

McDonald v. United States, 335 U.S. 451, 456 ..... 8, 17, 18

Simmons v. United States, 390 U.S. 377 19

United States v. Bozza, 2 Cir., 365 F.2d 206 19

United States v. Graham, 2 Cir., 391 F.2d 439 19

Wong Sun v. United States, 371 U.S. 471, 492 19

Other Authorities

Fourth Amendment, Constitution of the United States 7,

Rule 8(a) and (b), F.R.Cr.P. 9

In the
Supreme Court of the United States

October Term, 1970

No.

ALBERT TOCCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner, Albert Tocco, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet officially reported. It is printed in the Appendix to this Petition. (App. 1-25)

JURISDICTION

The judgment of the Court of Appeals affirming the conviction in the District Court was entered on July 31, 1970. (App. 1) A timely Petition for Rehearing was denied on November 2, 1970. (App. 26) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does this petitioner's aiding, abetting or procuring the theft of one automobile by two others, who are neither indicted nor charged as co-conspirators, which car was thereafter moved in interstate commerce by the others, satisfy the provisions of Rule 8 of the Federal Rules of Criminal procedure so that his joint trial with twelve other defendants concerning the theft of twenty-nine other vehicles is justified?

2. Does his participation in the theft of the one car delivered to the purchaser with a false or forged certificate of title, opined by an expert to have the same source as those used similarly by two charged co-defendants and which forged certificates of title came from a third co-defendant, justify petitioners conviction as a co-conspirator with those three and fourteen others? An added consideration on review of this question is that the proof did not show the forged certificate used by petitioner had any interstate character.

3. When the admission of evidence on the conspiracy count is recognized by the United States Court of Appeals for the Seventh Circuit, as violating:

a. This Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (App. 9);

b. This Court's decision in *Griffin* v. *State of California*, 380 U.S. 609 forbidding comment by the prosecution on an alleged co-conspirator's failure to produce evidence against himself (App. 10);

c. This Court's decision in *Aguilar* v. *Texas*, 378 U.S. 108, requiring, for a valid search, the affidavit therefor must state "some of the underlying circumstances from which the [items to be sought] were where he [the informant] claimed they were." (App. 11)

d. Fourth Amendment rights where an affidavit for a search warrant "is clearly insufficient for failure to show probable cause . . ." (App. 12).

Can the convictions on such evidence be sustained on the bald statement of the Court of Appeals that "the jury would have reached the same verdict" if the evidence had not been used (App. 10, 11, 17), and that a recognized failure to meet the *Aguilar* test is not conclusive?

4. Does this petitioner have standing to complain of the admittedly wrongful use of evidence on a joint trial where his co-defendants and alleged co-conspirators were the direct victims of constitutional deprivation of rights?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

AMENDMENT IV—Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 2312 provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 2313 provides:

> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 2314, so far as is pertinent, provides:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely

made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

* * *

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

STATEMENT OF THE CASE

This is a prayer to review affirmance by the United States Court of Appeals for the Seventh Circuit of a judgment of conviction on Counts I and XXI of a thirty count indictment (A. 20-36). Counts I and XXI were the only counts in which this petitioner was charged.

Count I charged he did conspire with twelve other named co-defendants and with five named but unindicted co-conspirators, to violate Sections 2312, 2313, and 2314 of Title 18, U.S.C., said sections proscribing respectively the knowing transportation of stolen motor vehicles in interstate commerce; the receipt, concealment, storage, barter, sale and disposal of such vehicles in interstate commerce; and, the knowing transportation of counterfeit securities in interstate commerce (A. 20-22).

Count XXI charged this petitioner with having knowingly transported a stolen 1964 Cadillac from Elkhart, Indiana to Harvey, Illinois (A. 32).

The Counts in which he was not charged alleged crimes by some of the other named Defendants with violations of Section 2312, the knowing transportation of other stolen motor vehicles in interstate commerce as follows:

Herman David: Counts II through XX (A. 23-32), XXII, XXIII, XXIV (A. 33-34), XXVIII (A. 35).

Robert David: Counts II through XVI (A. 23-30)

Orland David: Counts II through XVI (A. 23-30)

Bradley Eugene Wright: Count XVII (A. 30). Severed before trial and prosecution witness.

Larry Abraham: Count XVII (A. 30) Severed before trial and prosecution witness.

William McClurk: Count XXIII (A. 33).

Joseph Iatarola: Count XXV, XXVI (A. 34) XXVII (A. 35), XXIX, XXX (A. 36).

The Messrs. Nasse, Geidens, and Cobb were named only in Count I. (Cobb was also severed out before trial and a prosecution witness).

Prior to trial, this petitioner moved for a separate trial because of prejudicial joinder of defendants and charges (A. 36-37), and moved for severance during the course of trial on many occasions.

Prior to trial, the defendant Herman David moved to suppress evidence taken from his residence on September 9, 1965, and on November 20, 1965 (A. 48-51). During trial on April 3, 1967, he moved to suppress evidence taken from a motor vehicle on September 9, 1965. (A. 55-56)

All motions were denied. (A. 59)

REASONS FOR GRANTING THE WRIT

This petitioner prays that this Court will issue its writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit on the following grounds:

1. The joinder for trial of this petitioner on Count XXI of twenty-nine substantive counts violates the provisions of Rule 8 of the Federal Rules of Criminal Procedure. The lower court's basis for its conclusion that this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750, does not apply herein does not accord with the facts. On the facts adduced, the decision conflicts with *Kotteakos*.

2. When, as here, substantial amounts of evidence have been introduced admittedly violating the right of confrontation (*Bruton* v. *United States*, 391 U.S. 123); the right to be free from comment on the invocation of the Fifth Amendment privilege (*Griffin* v. *State of California*, 380 U.S. 609); the requirement for a valid search that the underlying circumstances for belief that contraband is on the premises must be stated (*Aguilar* v. *Texas*, 378 U.S. 108); and the right that searches may not be made except on probable cause (Fourth Amendment, Constitution of the United States), the bald statement that the verdict would have been the same, even if the evidence had not been used directly conflicts with this Court's decisions in *Bruno* v. *United States*, 308 U.S. 287; *Malinski* v. *People of the State of New York*, 324 U.S. 401 and *Kotteakos* v. *United States*, 328 U.S. 750.

3. The decision of the lower court that a wrongful denial of motions to suppress made by a co-defendant and alleged co-conspirator at a joint trial with petitioner cannot be the basis for complaint by the petitioner directly conflicts with this Court's decision in *McDonald* v. *United States*, 335 U.S. 451, and misapplies this Court's decision in *Alderman* v. *United States*, 394 U.S. 165.

1.

As can be seen from the Statement of the Case, Herman David formed the nexus among the alleged conspirators, partaking in the substantive crimes charged, and the hub of the alleged conspiracy. Only in the cases of Iatarola and this petitioner was Herman David not charged and found guilty as a co-perpetrator of the substantive counts.

The evidence, as the Court below found it, to sustain the guilty finding on the substantive Count XXI, follows. The court will note, that the proof starts with an extra-indictment offense, not Federal.

> "George Steger, who lived in Illinois, testified that in the spring of 1964 he agreed to buy a 1964 Cadillac from Tocco, proprietor of the Club Domino. Tocco delivered it May 9, together with an Indiana title, and received payment. Ervin Hager, * * *[1] testified that he, Tocco, and Dauber stole a 1964 Cadillac in Blue Island, Illinois. This was the car delivered by Tocco to Steger. It does not appear to have been transported in interstate commerce after the theft and was not named in any count. The incident was, however, relevant to show intent and pattern.
>
> "A short while later, Steger negotiated with Tocco to purchase a Cadillac for Mrs. Logan, Steger's secre-

[1] The omissions from this quotation from the decision will be treated shortly hereafter.

tary. Hager testified that Tocco, Dauber and Hager met in Chicago Heights. Tocco said he had a sale for another car and wanted Hager to pick it up. Hager, Dauber, and another stole a Cadillac from a dealer in Elkhart, Indiana and brought it back to Tocco's Club Domino in Illinois. * * *. It was shown that the payment received by Hager came from Tocco. This car was delivered June 6 to Mrs. Logan in Illinois. * * *

"Count 21 charges Tocco with the interstate transportation of the Logan car. There was proof from which the jury could find he induced Hager and Dauber to transport it * * * " (App. 20-21).

Though we attacked the proof on Count XXI for insufficiency in the Courts below—because its contradictory, and confusing nature was such as to require reasonable doubt—we do not do so here on this singular, individual set of facts, which will not have impact on a field of law for universal application. We do, however, submit that the statement makes it clear that this petitioner and this Court were wrongfully joined for trial under Rule 8(a) and (b) of the Federal Rules of Criminal Procedure. For the only basis for such joinder is that Hager (neither indicted nor named as principal or co-conspirator) had sometime subsequent to 1963 "stolen cars for Herman [David] and Abraham" (both named in other counts and both charged as co-conspirators). (App. 20)

It is clear that neither Herman David nor Abraham had anything to do with this Count XXI car, its theft or its transportation in interstate commerce. It is also clear that the theft and interstate transportation of this car cannot have been the subject of agreement between the charged co-conspirators, whether indicted or not, so as to make such theft and transportation the basis for including this petitioner in Count I, the Conspiracy Count.

The Court will note, however, that a forged Indiana title was delivered by Tocco to Steger (with the car stolen intrastate) as was such a forged Indiana title delivered to Mrs. Logan by Tocco for the Count XXI car (App. 20).

The portions omitted from the decision of the United States Court of Appeals for the Seventh Circuit, quoted in part above, dealt with those forged titles and their source, and refers to the testimony of an F.B.I. expert that these titles had the same source as some of the other cars involved in this indictment, most particularly, those used by Nasse and Iatarola, named and convicted as co-conspirators, as:

> "There was opinion testimony that the Indiana titles used by Nasse came from the same source as the Indiana titles used in re-titling the cars involved in counts 18 & 25, 19, 20 & 30, 24 & 27, and 28 & 29 (Iatarola) and in Count 21 (Tocco). • • • There was sufficient evidence linking the false titles with Herman." (App. 7).

As to the title given by Tocco to the purchaser, Steger, the evidence is that Hager (neither defendant nor co-conspirator) obtained it from Herman David, gave it to Dauber (neither defendant nor co-conspirator) who, apparently in turn gave it to this petitioner (A. 292-293). The evidence is clear that Herman David "didn't want anything else to do with it other than to sell us the title" (Hager Testimony, A. 291) The evidence is sure that the forged titles had no interstate character. This was so clearly recognized by the government that it dissembled a bit in its brief:

> "The defendant Tocco knew the cars he processed were stolen, and he knew the Count 21 car came from

> Elkhart, Indiana. He further knew of the counterfeit character of the Indiana titles, which had been printed by the defendant James Cobb in Griffith, Indiana, and which the defendant Tocco gave to George Steger." (Govt. Brief on Appeal pp. 41-42)

However, the Count XXI car was stolen and delivered in June, 1964, and James R. Cobb, the printer in Indiana, was not even approached by Herman David to forge titles until September, 1964, and did not begin manufacturing them until Easter (April 18), 1965. (A. 281-282).

Thus, the only excuse for the conspiracy charge as to petitioner must rest on the abetting of the theft of the Count XXI car, and its later interstate transportation. The inclusion is directly contrary to this Court's decision in *Kotteakos*:

> "We do not think that Congress . . . intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind through they might be, when the only nexus among them lies in the fact that one man participated in all. . . . But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved. . . . The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place."
> *Kotteakos* v. *United States*, 328 U.S. 750, 773-4.

This case is even farther removed than *Kotteakos*, since here as to the theft there is not even the common hub of the separate spokes.

2.

Associating this petitioner with Nasse, the co-conspirator, as the Court of Appeals does (App. 7), he was obviously affected by that admittedly illegal testimony which was admitted against Nasse. Though, in tempered language, it is clear that the Court below recognized the departure from the Mandate of this Court in *Bruton* (*Bruton* v. *United States*, 391 U.S. 123):

> Two government witnesses testified to conversations with Herman in which he said that a lot of cars had been sold to "dealers in Ohio" until these dealers were arrested with hot cars. These conversations occurred after September, 1962. Herman did not name or otherwise identify the dealers, but, since Nasse was a dealer in Ohio and had been arrested, the statements attributed to Herman were consistent with, and to some degree corroborative of, the other evidence against Nasse. Herman did not testify.
>
> Nasse sees here an application of the *Bruton* principle that admission of a statement of one defendant, inculpating another, violates the latter's right of confrontation if the former does not take the stand, and prejudice is not avoided by a limiting instruction. We note that Herman's statements were not made under circumstances where Herman was trying to shift or share the blame, a factor mentioned in *Bruton*. Their effect on Nasse's case was not "powerfully incriminating", nor "devastating".
>
> But assuming applicability of *Bruton* to the extent of any discernible corroborative effect, we are convinced beyond a reasonable doubt, that the jury would have reached the same verdict even if these two statements, and one other item of evidence, to be discussed, had not been before it." (App. 9-10).

This is the *first* admission of error of Constitutional proportion found "harmless".

Then, again, the Court below recognized that error of Constitutional proportion was committed by the prosecutor on closing argument:

> "In final argument, apparently with this testimony in mind, but mistakenly, the prosecutor referred to Nasse's volunteering to produce his records, but failing to do so. It is not perfectly clear that Nasse's declination under these particular circumstances must enjoy the full sanctity of a claim of his constitutional right not to incriminate himself. In any event, we are convinced, as before stated, that the jury would have reached the same verdict if Davis had not testified that Nasse declined to produce his records and if the prosecutor had not made his misstatement." (App. 10)

This is the *second* admission of constitutional error found "harmless".

The Court directed itself, then, to the Searches and Seizures. The affidavit for the search of Herman David's truck on September 9, 1965 reads as follows:

> "That an informant has advised affiant that one Herman David has obtained from a printer in Griffith, Indiana, certain counterfeit checks drawn on a Gary, Ind. bank, all of which has been transported in interstate commerce from Chicago Heights, Ill. to Gary, Ind.; further that Herman David now has concealed in the aforesaid vehicle certain printing plates used to manufacture said counterfeit checks. That aforesaid vehicle is known to affiant as a green Ford panel truck parked at the above location.
>
> "Affiant states that other F.B.I. agents have informed him that a truck of the description in the caption hereof is parked at the location set forth above.
>
> "Affiant states that said informant informed the F.B.I. on a prior occasion of the whereabouts of a fugitive who was later there apprehended."

The Court below conceded that the affidavit "does not explicitly meet the other *Aguilar* test of stating 'some of

the underlying circumstances from which the informant concluded that the [items to be sought] were where he claimed they were' . . . " (App. 11).

The opinion continues with an apologia pretending to excuse the articulation of this Court as to the necessary requirements to the satisfaction of the Fourth Amendment.

The opinion concedes that "[t]he search of the truck produced a very substantial amount of evidence relevant to the case," it found that, notwithstanding the admitted failure to comply with *Aguilar* (*Aguilar* v. *Texas*, 378 U.S. 108), the wealth of evidence was properly admitted.

This is the *third* admission of Constitutional error found harmless.

The search of Herman's house on September 9, 1965 was based on an affidavit so baldly insufficient that no rationalization could even purport to excuse it. It was determined the search and seizure was a violation of Fourth Amendment Rights. (App. 12). But it too was found harmless. (App. 16, 17)

This is the *fourth* admission of constitutional error found "harmless".

In permitting the evidence, the Court found:

> "Thirty-one exhibits were recovered. Our examination of each leaves no doubt in our minds that, despite the many items obtained in this search, they were cumulative to other credible evidence or pertained to matters not in issue and that no leads prejudicial to Herman were obtained from them. Moreover, the other evidence in the case by itself left the jury no choice but to convict Herman." (App. 16-17)[2]

---

[2] The lower court's preoccupation with Herman David in this regard, to the exclusion of the co-defendants simultaneously standing trial is based on the Seventh Circuit holding that the others, including this petitioner, had no standing to complain.

The September 9th search of the truck produced Exhibit 56, a plate for making Indiana titles (App. 183), and Exhibits 50 through 55, which purported to be Indiana certificates of title. (App. 188). It was through a comparison of Exhibits 50 through 55 and Exhibits 109-112 seized at David's home on September 9th (App. 230) that the expert witness for the Government formed an opinion that the Indiana title presented by Steger as having been received from Tocco (Ex. 21-C) for the Count XXI car were derived from a source common to those produced from Nasse and Intarola (A. 240-245).

But these *four* admitted errors of constitutional proportion are cast aside on the bald statement of the Court of Appeals that "the jury would have reached the same verdict" if the errors had not been made, and that the requirements of *Aguilar* were not conclusive.

Such cavalier treatment of constitutional error directly conflicts with this Court's decision in *Bruno* v. *United States*, 308 U.S. 287:

> "A subsidiary question remains for determination. It derives from the Acts of February 26, 1919, 40 Stat. at L. 1181, chap. 48, and January 31, 1928, 45 Stat. at L. 54, chap. 14, 28 USCA § 391, whereby appellate courts are under duty in criminal as well as in civil cases to disregard 'technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' Is the disregard of the right which Congress gave to Bruno an error, the commission of which we may disregard? We hold not. It would be idle to predetermine the scope of such a remedial provision as § 391 by anticipating the myriad varieties of rulings made in trials and attempting an abstract, inclusive definition of 'technical errors.' Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and

> minutiæ of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him." 308 U.S. at 293-4.

To the same effect see *Malinski* v. *People of the State of New York*, 324 U.S. 401, 404; *Lewis* v. *Oklahoma*, 322 U.S. 596, 597, Fn. 1 and cases cited therein.

These errors are each departures from the constitutional norm (*Kotteakos* v. *United States*, 328 U.S. 750, 764), and cannot be shrugged aside on the statement that the verdict would have been the same if the errors had not occurred. The decisions of this Court, relied on by the Court below (*Chapman* v. *California*, 386 U.S. 18 and *Harrington* v. *California*, 395 U.S. 250) do not militate against this principle.

3.

The United States Court of Appeals for the Seventh Circuit has held in this case that the foregoing *four* admitted constitutional errors cannot be complained of by this petitioner (and other defendants) because they do not assert any possessory interest in the premises nor that their personal rights to privacy were infringed.

"The Supreme Court in *Alderman* v. *United States* has restated the rule:

> " 'The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.'

"The Court's basic reasoning was as follows:

> " 'The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression

> of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.'" (App. 16)

We submit that the decision missapplies the decision in *Alderman*, and its holding is in direct conflict with this Court's decision in *McDonald* v. *United States*, 335 U.S. 451.

Here, though motions for severance were filed before, and raised during trial, this petitioner was nonetheless tried jointly with the parties directly affected. Herman David made timely and proper motions to suppress. If they were improperly denied, as is his contention which we adopt, they could not be used on his trial, and since his trial was TOCCO's, they could not be used there either. This is set forth forthrightly in *Alderman:*

> "The exclusionary rule fashioned in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961), *excludes from a criminal trial* any evidence seized from the defendant in violation of his Fourth Amendment rights." (Emphasis Ours) *Alderman* v. *U. S.*, 394 U.S. 165, 171.

Our submission that this evidence cannot be admitted in a trial where this petitioner was unwillingly subjected to a joint trial is further buttressed by other language in *Alderman:*

> "There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.

> The victim can and very probably will object for himself when and if it becomes important for him to do so." *Alderman* v. *U. S.*, 394 U.S. 165, 174.

In this regard, we think *Alderman* stands for the rule established in *McDonald* v. *United States*, 335 U.S. 451, upon which we rely and here re-affirm our reliance.

> "It follows from what we have said that McDonald's motion for suppression of the evidence and the return of the property to him should have been granted. Weeks v. United States, supra; Go-Bart Importing Co. v. United States, 282 U.S. 344, 358, 51 S.Ct. 153, 158, 75 L.Ed. 374. It was, however, denied and the unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case, unlike Agnello v. United States, supra, 269 U.S. at page 35, 46 S.Ct. at page 7, 70 L.Ed. 145, 51 A.L.R. 409, the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial. We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative." *McDonald* v. *United States*, 335 U.S. 451, 456.

No case we have found stands for any proposition contrary to what we here urge upon this Court. The leading case, at least in time, respecting the want of standing in a defendant where his co-defendant has suffered a violation of Fourth Amendment rights is *Goldstein* v. *United States*, 316 U.S. 114. That is not the case we have here. In that case, the co-defendant affirmatively waived his Fourth

Amendment rights and, in fact, was the chief prosecution witness.

There is some language in *Wong Sun* v. *United States*, 371 U.S. 471, as respects the narcotics obtained from Wong Sun's co-defendant Toy. However, the question is not answered directly in that case, and the language employed by this Court seems to contemplate a separate trial where Toy is not present.

> "The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at *his* trial." (Emphasis Ours) *Wong Sun* v. *U. S.*, 371 U.S. 471, 492.

We see no relationship between this case and *Simmons* v. *United States*, 390 U.S. 377; *United States* v. *Bozzo*, 2 Cir., 365 F.2d 206, and *United States* v. *Graham*, 2 Cir., 391 F.2d 439, where searches were found to be legal. Further, in *Simmons*, it does not appear that the co-defendant raised any point on the issue, and in the other two cases (*Bozzo* and *Graham*) the person aggrieved did not effect an appeal. Further, we are not impressed by the decisions (*Bozzo* and *Graham*) that tend to undermine an opinion of this Court *(McDonald)* because *only* four Justices favored it. It could be equally noted that the dissent did not see fit to comment on the shelter given McDonald's co-defendant Washington in the main opinion.

Despite the criticisms of the Second Circuit, this Court has not seen fit to overrule *McDonald*, which it is quite capable of doing. To our understanding, it continues the law of the land. It is doubly enforced by the quotation above from *Alderman* that illegal evidence shall not be used in a case where the person aggrieved is on trial.

CONCLUSION

Wherefore, for the above and foregoing reasons, this petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner

APPENDIX

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

Nos. 16460, 16461, 16462, 16463, 16464

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE NASSE, ALBERT TOCCO, ORLAND DAVID, ROBERT DAVID, HERMAN DAVID and JOSEPH IATAROLA,

Defendants-Appellants.

July 31, 1970

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Before FAIRCHILD and KERNER, *Circuit Judges*, and ESCHBACH, *District Judge*.[1]

FAIRCHILD, *Circuit Judge*. This case concerns transactions in which automobiles were stolen, their identifying numbers altered, spurious state title documents created, and the automobiles sold in different states.

[1] Judge Eschbach is sitting by designation from the Northern District of Indiana.

The indictment contains 30 counts. Count 1 charges a conspiracy among thirteen defendants and others. Each other count charges one or more defendants with interstate transportation of a particular stolen automobile. Five pairs of counts each relate to one automobile, but each of the pair charges a separate transportation of that automobile.

Ten defendants were involved in the trial now under consideration. The charges against Cobb, Wright, and Abraham had been severed, and these men were government witnesses. Four of those tried were acquitted, Geidens on motion at the close of the evidence, and Peter Nasse, McGurk, and Nash, by the jury.

The verdicts as to the remaining six, now appellants, were as follows: Herman David had been charged in the conspiracy count and in one transaction count for each of the automobiles involved except one. He was found guilty in counts 1 through 20, 24, and 28; not guilty on counts 22 and 23. Herman's sons, Robert (Bob) and Orland (Joe), had been charged in the conspiracy count and transaction counts 2 through 16. They were found guilty on count 1 and counts 8 through 16, but not guilty on counts 2 through 7. Joseph Iatarola had been charged in the conspiracy count and five transaction counts. He was found guilty on count 1 and counts 25, 26, 27, and 30, and not guilty on count 29. Albert Tocco had been charged in the conspiracy count and count 21. He was found guilty on both. George Nasse had been charged only in the conspiracy count, and was found guilty.

Count 1 charged a conspiracy knowingly to transport stolen motor vehicles in interstate commerce, to receive, conceal, store, barter, sell and dispose of such stolen motor vehicles, and knowingly to transport counterfeit securities (the spurious state titles) in interstate commerce.

The conspiracy was said to include stealing motor vehicles, stealing serial plates from other motor vehicles and attaching them to the stolen vehicles, altering the identification numbers on the frames of the stolen ones so as to agree, preparing counterfeit state titles for use in selling and retitling the vehicles, and transporting the stolen vehicles to other states for sale. The conspiracy was alleged to have existed from April, 1962 to November, 1965, when the indictment was returned.

The evidence fully established the pattern described, and Herman David as the central figure, supervising the transactions and creating the spurious titles.

Counts 2 through 7 relate to automobiles stolen in Illinois from April 14, 1962 to September 11, 1962. These cars have been referred to as the Nasse cars, since in each case George Nasse, of Youngstown, Ohio, obtained an Ohio title before selling the car. Counts 8 through 12 relate to automobiles stolen in Illinois from September 16, 1962 to December 20, 1962. These cars were sold in California, and have been referred to as the Scarcelli cars, from the name of the dealer who took them to that state.

Counts 13 through 16 relate to automobiles stolen in Illinois or Indiana from September 3, 1963 to November 29, 1963. These cars were sold in Missouri, Ohio, and Pennsylvania, and have been referred to as the Lasky cars (so named from a conspirator who was a witness). Count 17 relates to an automobile stolen in Illinois December 26, 1963 and sold in Indiana. It is referred to as the Wright car. Counts 18 & 25, 19, 20 & 30, 22 & 26, 23, 24 & 27, and 28 & 29 relate to cars stolen in Illinois from February 1, 1964 to February 1, 1965 and titled in other states. They have been referred to as the Iatarola

cars. Count 21 refers to a car stolen June 5, 1964 in Indiana and sold in Illinois. It is referred to as the Tocco car.

Herman David concedes the sufficiency of the evidence, but contends on appeal that much of it was derived from unlawful search. There can be no real question of the sufficiency of the evidence as to each transaction count upon which any defendant was convicted. The defendants other than Herman make various claims, including the claim that the government failed to prove the conspiracy charged and that they were prejudiced by a joint trial of the other charges, and the consideration by the jury of the statements and acts of their co-defendants as co-conspirators.

1. THE CLAIM OF VARIANCE AS TO THE CONSPIRACY COUNT.

Defendants allege that the evidence showed no more than a number of separate conspiracies in which Herman was one of the conspirators. They rely on *Kotteakos* v. *United States.*[2]

Here, unlike *Kotteakos*, the defendants knew that illegal acts on the part of a chain of participants—thieves, counterfeiters, camouflagers, people to transport the stolen autos, and salesmen—were necessary to the total operation. As stated in *Blumenthal* v. *United States,*[3]

> "The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing

[2] (1946), 328 U.S. 750, 66 SCt. 1239, 90 LEd. 1557.

[3] (1947), 332 U.S. 539, 68 SCt. 248, 92 LEd 154.

> in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.
>
> • • •
>
> "All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan."[4]

It is true that the participants other than Herman (and perhaps his sons) changed from time to time. Some were shown to have been added and some withdrew, but the participation of some overlapped the participation of others. We deem it reasonable to consider the operations as those of a going concern, understood by all to be so, with changes in personnel, rather than as separate transactions or groups of transactions.

As stated in *United States* v. *Varelli*:[5]

> "While the parties to the agreement must know of each other's existence, they need not know each other's identity nor need there be direct contact. The agreement may continue for a long period of time and include the performance of many transactions. New parties may join the agreement at any time while others may terminate their relationship. The parties are not always identical, but this does not mean

---

[4] *Id.* at 558-9. See also 332 U.S. at 554 n. 14, and *United States* v. *Borelli* (2d Cir., 1964), 336 F2d 376, 383 n. 2, cert. den., 379 U.S. 960 (1965).

[5] (7th Cir., 1969), 407 F2d 735, 742.

that there are separate conspiracies. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 922-35 (1959).[8]

II. THE CLAIMS OF GEORGE NASSE.

(1) Nasse was not charged in any transaction count, and claims that the evidence was insufficient to show that he was a member of the conspiracy. It is the government theory that his conduct shows he had an agreement with other participants to receive and dispose of the stolen cars.

Nasse is a used car dealer in Youngstown, Ohio. In 1962 he sold a number of used cars at an auction in Pennsylvania. Six of them were the stolen cars involved in counts 2 through 7 and another was a stolen car not involved in any transaction count. Nasse obtained Ohio titles for each before selling it. In each instance he presented a spurious Illinois or Indiana title which named as owner some automobile dealer who in fact never owned a car of that description. The three Illinois titles were purportedly notarized by the same notary, but the signatures were not genuine and the real notary's notary public stamp had disappeared before these titles were notarized. Three of the four Indiana titles were purportedly notarized by the same notary and the fourth by a different one, but neither notary had ever been commissioned in Indiana.

The cars were a Thunderbird, stolen April 14 and titled by Nasse April 16; a Cadillac stolen May 4 and titled May 15; a Cadillac stolen May 16 or 17 and titled May 23; a Cadillac stolen August 8 and titled August 15; a Cadillac stolen September 7 and titled September 14; a Cadillac stolen September 11 and titled September 18;

---

[8] See also *Blumenthal, supra,* at 556-7.

and a Cadillac stolen September 6 and titled September 18. Illinois titles were presented for the cars stolen April 14, May 4, and May 17; Indiana titles for those stolen August 8, September 7, September 11, and September 6. When ultimately recovered, each car bore a serial plate which had been removed from some other car, as did all the cars involved in the other transaction counts.

There was opinion testimony that the Indiana titles used by Nasse came from the same source as the Indiana titles used in re-titling the cars involved in counts 18 & 25, 19, 20 & 30, 24 & 27, and 28 & 29 (Iatarola) and in count 21 (Tocco). There was opinion testimony that false numbers on the cars stolen May 4 and 17 were made with the same stamp as those on cars involved in counts 8, 9, 10, 11, and 12 (Scarcelli). There was sufficient evidence linking the false titles with Herman.

Thus there was ample evidence that these seven cars received, titled, and sold by Nasse had in fact passed through the hands of Herman David and other conspirators. We think also that the circumstances, particularly including the short period of time in each case between the theft and the handling by Nasse, and the repetition of the pattern seven times in five months, demonstrates a sufficient probability that Nasse was a knowing and willing participant in the scheme so that in the absence of a satisfactory explanation an inference may properly be drawn accordingly.

Nasse did not testify. He was arrested in September, 1962, by Ohio officers because of his possession of a stolen automobile and there is no proof that he was active in the conspiracy after that date. In February and March 1963 he was interviewed by FBI agent Davis about 23 cars which were found to have been stolen and which

Nasse had sold at car auctions. Nasse was not in custody and voluntarily came to the office where he was interviewed. Nasse told the agent he obtained these cars from an individual he knew only as Stan; that he had met Stan casually in November, 1961 at an auction; Stan showed up in March, 1962 at Nasse's place of business with a Cadillac to sell; Nasse bought and Stan came back a number of times between March and September; Stan furnished Illinois or Indiana titles; Nasse never knew Stan's last name nor how to get in touch with him; Nasse would take Stan to the bank, make out a check to cash, cash it and give Stan the proceeds; Nasse paid from $3500 to $4500 for each car and made a profit of only $50 to $150 on each car.

We think the jury was entitled to consider this narrative, as it evidently did, a fairy tale, and that Nasse's telling it strengthened rather than weakened the proof against him.

(2) The court instructed the jury, in substance, that possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence that the person in possession knew the property had been stolen; and further instructed that it was the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence warrant such inference.

Defendant appears to rely on cases dealing with presumptions rather than permissible inferences. We see no error in the instruction.[1]

---

[1] See *United States* v. *Hood* (7th Cir., 1970), 422 F2d 737, 741; *United States* v. *Riso* (7th Cir., 1968), 405 F2d 134, 137-8.

(3) Nasse was arrested September 27, 1962, and the court instructed the jury that statements or acts of the alleged conspirators after that date should not be considered against Nasse.

Two government witnesses testified to conversations with Herman in which he said that a lot of cars had been sold to "dealers in Ohio" until these dealers were arrested with hot cars. These conversations occurred after September, 1962. Herman did not name or otherwise identify the dealers, but, since Nasse was a dealer in Ohio and had been arrested, the statements attributed to Herman were consistent with, and to some degree corroborative of, the other evidence against Nasse. Herman did not testify.

Nasse sees here an application of the *Bruton* principle that admission of a statement of one defendant, inculpating another, violates the latter's right of confrontation if the former does not take the stand, and prejudice is not avoided by a limiting instruction.[8] We note that Herman's statements were not made under circumstances where Herman was trying to shift or share the blame, a factor mentioned in *Bruton*. Their effect on Nasse's case was not "powerfully incriminating", nor "devastating".[9]

But assuming applicability of *Bruton* to the extent of any discernible corroborative effect, we are convinced beyond a reasonable doubt, that the jury would have reached the same verdict even if these two statements,

---

[8] *Bruton* v. *United States* (1968), 391 U.S. 123.

[9] See *Bruton*, p. 135-6; *Slawek* v. *United States* (8th Cir., 1969), 413 F2d 957, 961-4, and cases cited therein.

and one other item of evidence, to be discussed, had not been before it.[9a]

(4) We have already mentioned the interview of Nasse by Agent Davis. In the course of it David asked Nasse whether he had his checks and other records of his transactions with Stan. Nasse replied they were in the custody of his attorney. Davis asked if Nasse would make them available, but Nasse declined. In final argument, apparently with this testimony in mind, but mistakenly, the prosecutor referred to Nasse's volunteering to produce his records, but failing to do so. It is not perfectly clear that Nasse's declination under these particular circumstances must enjoy the full sanctity of a claim of his constitutional right not to incriminate himself. In any event, we are convinced, as before stated, that the jury would have reached the safe verdict if Davis had not testified that Nasse declined to produce his records and if the prosecutor had not made his misstatement.

III. SEARCH AND SEIZURE ISSUES.

(1) *Search of Herman David's truck on September 9, 1965.*

FBI Agent Robert L. Zimmerman obtained a warrant from the United States Commissioner to search Herman's truck. Zimmerman's affidavit described the truck and stated the address in the vicinity of which it was parked. Zimmerman stated that he had reason to believe that there were, concealed in the truck, "printing plates designed for manufacturing counterfeit checks" which had been used to commit a federal offense.

The facts relied on were stated as follows:

"That an informant has advised affiant that one Herman David has obtained from a printer in Grif-

[9a] *Harrington* v. *California* (1969), 395 U.S. 250.

fifth, Indiana, certain counterfeit checks drawn on a Gary, Ind. bank, all of which has been transported in interstate commerce from Chicago Heights, Ill. to Gary, Ind.; further that Herman David now has concealed in the aforesaid vehicle certain printing plates used to manufacture said counterfeit checks. That aforesaid vehicle is known to affiant as a green Ford panel truck parked at the above location.

"Affiant states that other F.B.I. agents have informed him that a truck of the description in the caption hereof is parked at the location set forth above.

"Affiant states that said informant informed the F.B.I. on a prior occasion of the whereabouts of a fugitive who was later there apprehended."

Applying the *Aguilar* test,[10] Zimmerman's affidavit fulfills the requirement that it state "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' . . . ." It does not explicitly meet the other *Aguilar* test of stating "some of the underlying circumstances from which the informant concluded that the [items to be sought] were where he claimed they were", but we think there was sufficient detail and corroboration so as to permit the commissioner to decide that the tip was sufficiently trustworthy, as explained in *Spinelli*.[11] The informant had supplied such details as the location of the printer of counterfeit checks printed with the plates being sought, the location of the bank on which they were drawn, and the places between which the checks had been transported. Zimmerman said he had personal knowledge of the truck as well as verification from other agents of its present location. A magistrate may infer from sufficiently detailed information "that the informant had gained his information in a reliable way."[12]

---

[10] *Aguilar* v. *Texas* (1964), 378 U.S. 108, 114.

[11] *Spinelli* v. *United States* (1969), 393 U.S. 410, 415-419.

[12] *Spinelli*, p. 417.

The search of the truck produced a very substantial amount of evidence relevant to this case, and it was properly admitted.

(2) *Search of Herman's house on September 9, 1965.*

In the evening of September 9, an Illinois circuit judge issued a warrant for the search of Herman's home. A state police officer made the application. His affidavit requested a warrant to search the residence and to seize counterfeit Illinois drivers' licenses and certificates of title used to commit a particular state offense. The facts supporting probable cause were stated as follows:

> "Complainant has received evidence of this crime from an informant; said informant has previously given complainant evidence of crimes and he has proved himself to be reliable in that arrests and convictions have resulted from information given by him."

The affidavit is clearly insufficient for failure to show probable cause and the resulting search and seizure violated Herman's fourth amendment rights.

(3) *Searches incident to arrest.*

The indictment in this case was issued November 12, 1965 and warrants issued for 13 defendants who would probably be found in widely separated locations.

Joe David was arrested in his home at 4:00 a.m., November 20. Agents searched his home and attached garage and discovered a radio capable of receiving FBI calls in the seat of a car in the garage. The search concluded about 5:30 a.m.

Herman was arrested in his home at 7:15 a.m. A thorough search of the home was conducted by eleven agents, looking for "license plates for cars, titles for cars, anything that would indicate an operation involving cars." The search consumed about two hours.

Defendants assert that the searches were unreasonable because the arrest warrants were eight days old when executed. The government answers that in view of the nature of the charges, the number of defendants and the location of their residences the FBI acted reasonably in effecting the simultaneous arrests of these defendants to prevent their flight or the destruction of evidence. We find that the delay involved here was not unreasonable.[13]

Defendants also contend that the scope of the searches here violated their rights under the fourth amendment. We would agree if *Chimel* v. *California*[14] were to be given retroactive effect.

The Supreme Court, however, has not applied *Chimel* retroactively[15] and several circuits, including the seventh, have held that *Chimel* is not to be applied to searches occurring prior to June 23, 1969, the date of the *Chimel* decision.[16] Thus, this case will be considered under pre-*Chimel* law.

Prior to *Chimel*, a search incident to a lawful arrest could reasonably extend to any area considered to be in the "possession" or under the "control" of the person

---

[13] See *Williams* v. *United States* (9th Cir., 1969), 418 F2d 159.

[14] (1969), 395 U.S. 752.

[15] See *Von Cleef* v. *New Jersey* (1969), per curiam, 395 U.S. 814; *Shipley* v. *California* (1969), per curiam, 395 U.S. 818; and *Vale* v. *Louisiana*, 38 L.W. 4544.

[16] *United States* v. *Blassick* (7th Cir., 1970), 422 F2d 652; *United States* v. *Bennett* (2d Cir., 1969), 415 F2d 1113; *Lyon* v. *United States* (5th Cir., 1969), 416 F2d 91; *Williams* v. *United States* (9th Cir., 1969), 418 F2d 159, 161; *Whiteley* v. *Meacham* (10th Cir., 1969), 416 F2d 36.

arrested.[17] The prior law was summarized in *United States ex rel Mahoney* v. *LaVallee*:[18]

> "In *Harris, supra*, a thorough five-hour search of a four-room apartment was found to be incidental to a lawful arrest in the living room of an apartment, although it was apparent on the facts that, since the accused had been taken into custody, there was no danger that he would destroy the fruits or instrumentalities of the crime in the apartment or use a weapon hidden in it. And in *Rabinowitz, supra*, a search of a one-room office was held incidental to an arrest made there, although here too it was clear that the immediate search of the entire office without a warrant was not necessary to protect the arresting officers or to prevent the destruction of the fruits of the crime. . . . And, we are reassured that the Supreme Court still adheres to its pronouncement in *Rabinowitz*, for it recently stated, it is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' *United States* v. *Rabinowitz*, 339 U.S. 56, 66, 70 SCt. 430. *Cooper* v. *State of California*, 386 U.S. 58, 62, 87 SCt. 788, 791, 17 LEd2d 730 (1967). See also *Ker* v. *State of California*, 374 U.S. 23, 41-42, 83 SCt. 1623, 10 LEd2d 726 (1963)."

We find no valid distinction between the case at hand and the *Harris* and *Rabinowitz* cases. As noted in *Chimel*,

> "It would be possible, of course, to draw a line between *Rabinowitz* and *Harris* on the one hand, and this case on the other. For *Rabinowitz* involved a single room, and *Harris* a four-room apartment, while in the case before us an entire house was searched. But such a distinction would be highly artificial. The

---

[17] See *Chimel*, 395 U.S. at 760.

[18] 396 F2d 887, 888 (2d Cir., 1969), cert. den. 395 U.S. 985 (1969).

rationale that allowed the searches and seizures in *Rabinowitz* and *Harris* would allow the searches and seizures in this case."[19]

Thus, we conclude that the defendants' fourth amendment rights were not violated in the searches at the time of the arrests.[20] These searches did not involve "mass seizures" of the entire contents of the houses.[21] Rather, "there was fair basis for belief that the place searched . . . would contain instruments or fruits of the crime for which the arrest was made."[22] Moreover, the facts of this case, involving an alleged conspiracy, suggest that the possibility of destruction of the incriminating evidence was not remote. The fact of the presence of two other people in Herman's home and a phone call received by him also suggest that an immediate search may have been necessary to preserve material subject to seizure.

(4) *The standing of defendants other than Herman to object to the September 9 search of Herman's house.*

---

[19] 395 U.S. at 766.

[20] The search in *United States* v. *Francolino* (2d Cir., 1966), 367 F2d 1013, cert. den., 386 U.S. 960 (1967) was similar to that of Joe David's car. As to the search of Herman's house, see *United States ex rel Mahoney* v. *LaVallee, supra; United States* v. *Durham* (7th Cir., 1969), 409 F2d 1170; *United States* v. *Blassick, supra; United States* v. *Satterfield* (7th Cir., 1969), 410 F2d 1351; *United States* v. *Valdes* (2d Cir., 1969), 417 F2d 335; *United States* v. *Baratta* (2d Cir., 1968), 397 F2d 215, 223, cert. den., 393 U.S. 939; *Lyon* v. *United States, supra; Argo* v. *United States* (9th Cir., 1967), 378 F2d 301; and *Abel* v. *United States* (1960), 362 U.S. 217, 235-8, 80 SCt. 683, 4 LEd2d 668, 684-5. Compare *Shipley* v. *California, supra.*

[21] See *Kremen* v. *United States* (1957), 353 U.S. 346, 1 LEd2d 876, and *Von Cleef* v. *New Jersey, supra.*

[22] *United States* v. *Francolino, supra,* at 1017.

Defendants contend that the invalidity of the search of Herman's house pursuant to an invalid warrant voids their convictions. They do not assert any possessory interest in the premises nor that their personal rights to privacy were infringed.

The Supreme Court in *Alderman* v. *United States*[23] has restated the rule:

> "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing."[24]

The Court's basic reasoning was as follows:

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[25]

(5) *The harmless error question.*

Thus, the final search and seizure question is whether the introduction of articles seized in the invalid search

---

[23] (1969), 394 U.S. 165, 89 SCt. 961, 22 LEd2d 76, reh. den. 394 U.S. 939.

[24] *Id.* at 171-2.

[25] *Id.* at 174-5.

of Herman's home on September 9 constituted harmless error, as to him, beyond a reasonable doubt.[26]

While a good deal of evidence relevant to Herman's guilt was obtained by the September 9 search of his house, the mere fact that it was relevant does not necessarily mean that defendant's substantial rights were prejudiced. To hold otherwise,

> "would be tantamount to a rule of automatic reversal. Presumably evidence is admitted only if it is relevant to the defendant's guilt or innocence. Thus under [a standard finding reversible error wherever the error 'played any part in the jury's determination'] there is no piece of evidence that one can state with confidence did not 'contribute' to the conviction. Moreover, this test is not logically related to the protection of the defendant's legitimate interests, which are unaffected by errors which were extremely unlikely to have changed the results at trial."[27]

Thirty-one exhibits were recovered. Our examination of each leaves no doubt in our minds that, despite the many items obtained in this search, they were cumulative to other credible evidence or pertained to matters not in issue and that no leads prejudicial to Herman were obtained from them. Moreover, the other evidence in the case by itself left the jury no choice but to convict Herman.

IV. CLAIMS OF BOB and JOE DAVID.

(1) *Sufficiency of proof of conspiracy.*

Bob and Joe David were found not guilty of transaction counts 2 through 7 (Nasse cars), but guilty of transaction

---

[26] *Chapman* v. *California* (1967), 386 U.S. 18; *Harrington* v. *California* (1969), 395 U.S. 250. See also Note, *Harmless Constitutional Error: a Reappraisal*, 83 Harv. L. Rev. 814 (1970).

[27] Note, *Harmless Constitutional Error: a Reappraisal*, 83 Harv. L. Rev. 814, 819 (1970).

counts 8 through 16 (Scarcelli and Lasky cars). They claim there was insufficient evidence to support their convictions of conspiracy.

There was, however, testimony that changed serial numbers on two of the Nasse cars and on the Scarcelli cars were made by the same 3/16 inch die stamp, as well as that numbers on one of the Scarcelli cars and on the Lasky cars were made by the same 1/4 inch die stamp.

Willard Lasky testified that Bob and Joe had solicited his services in disposing of automobiles in early 1963; they had told him the automobiles were "perfect", even the secret numbers were covered and there was no way to tell that the automobile was legitimate or illegitimate; one fellow had got picked up with one, but it was so perfect the authorities couldn't prove it was stolen; the certificates of title were so good you couldn't tell one from a real title printed in Springfield.

Scarcelli testified that Bob and Joe had solicited his services in late 1962 or early 1963 and had delivered cars and titles to him. Such deliveries must have occurred very soon after the car had been stolen, allowing only a short time for camouflaging.

Scarcelli testified that after FBI agents questioned him, Bob David had him come to meet Bob and Joe. Joe indicated he knew about the FBI interview and said he had a radio which could pick up FBI calls. Such a receiver was later found in the car when Joe was arrested. Steger testified that after he had ridden with agents in an FBI car, Tocco told Steger "they" had heard the radio from the FBI car. Scarcelli and Lasky testified to threats made by Bob and Joe for the apparent purpose of keeping them cooperative.

We conclude that there is sufficient evidence that Bob and Joe were members of the conspiracy.

(2) *Statement by Herman.*

Abraham testified to a statement by Herman, already referred to, that he and Bob and Joe sold cars to a dealer in Ohio. Once the memberships of Bob and Joe in the conspiracy was established, this statement was admissible against Bob and Joe. It was sales talk to interest Abraham in cooperating and thus was in furtherance of the conspiracy. In any event, the jury seems not to have given it much weight, for it found Bob and Joe not guilty of the Nasse sales.

(3) *Miranda problem.*

An agent testified that when Joe David was arrested he was given certain warnings, then shown photographs of Herman, Bob, and Lasky. He identified Herman and Bob, but denied knowing Lasky. The agent so testified after other proof showed that Joe knew Lasky. Although the defense had been given the 3500 statements of the agent no effort was immediately made to challenge the sufficiency of the warnings. The first such effort was a motion to strike, made by Herman's counsel after cross-examination of the agent was completed.

The government relies on the tardiness of the challenge.[28] We agree that the challenge was tardy and is foreclosed as a result.

---

[28] See *Isaacs* v. *United States* (8th Cir., 1962), 301 F2d 706, 734, cert. den. 371 U.S. 818 (1963); *Pinkney* v. *United States* (5th Cir., 1967), 380 F2d 882, 885-6, cert. den. 390 U.S. 908 (1968); *United States* v. *Aadal* (2d Cir., 1966), 368 F2d 962, 965; and *United States* v. *Indiviglio* (2d Cir., 1965), 352 F2d 276.

V. THE TOCCO CLAIMS.

(1) *Sufficiency of evidence.*

George Steger, who lived in Illinois, testified that in the spring of 1964 he agreed to buy a 1964 Cadillac from Tocco, proprietor of the Club Domino. Tocco delivered it May 9, together with an Indiana title, and received payment. Ervin Hager, who had met Herman in 1963 and discussed the purchase of blank Indiana titles for $1,000 each with Herman and Abraham, and subsequently stolen cars for Herman and Abraham, testified that he, Tocco, and Dauber stole a 1964 Cadillac in Blue Island, Illinois. This was the car delivered by Tocco to Steger. It does not appear to have been transported in interstate commerce after the theft and was not named in any count. The incident was, however, relevant to show intent and pattern.

A short while later, Steger negotiated with Tocco to purchase a Cadillac for Mrs. Logan, Steger's secretary. Hager testified that Tocco, Dauber and Hager met in Chicago Heights. Tocco said he had a sale for another car and wanted Hager to pick it up. Hager, Dauber, and another stole a Cadillac from a dealer in Elkhart, Indiana and brought it back to Tocco's Club Domino in Illinois. Hager received a title from Herman. It was shown that the payment received by Hager came from Tocco. This car was delivered June 6 to Mrs. Logan in Illinois. The Indiana title turned over to her was made out in the name of an apparently fictitious person, and came from the same source as the Indiana titles for three Nasse cars and five Iatarola cars. Tocco later procured another stolen car for a friend of Steger. Steger was interviewed by the FBI in June, 1964. Tocco asked Steger what the

FBI had said and told him that "they" had heard the radio from the FBI car when Steger was in it, coming back from the police station in Harvey. Tocco said "they haven't got anything on anybody if you don't say anything."

Count 21 charges Tocco with the interstate transportation of the Logan car. There was proof from which the jury could find he induced Hager and Dauber to transport it. We think the proof also sufficed to show participation in the conspiracy.

(2) *3500 statements.*

Defense counsel asked for Scarcelli's grand jury testimony. The government asserted there had been no showing of particularized need. The court examined the transcript *in camera* and said he found no discrepancies.

Tocco asserts he was entitled to see the testimony himself. The rule on this subject stated for this circuit in *United States* v. *Amabile*[29] was limited to application in trials commencing after April 26, 1968. Without the benefit of *Amabile*, defendants were not entitled to the grand jury testimony.[30]

Another witness testified about matters some of which were not covered in the 3500 statements given to the defense. The prosecutor assured the court he had made a search of his files and found no additional statements. No reason was shown why this assurance should not be accepted.

Steger and Hager were important witnesses. They were not called before the grand jury and thus no grand jury

[29] (1968), 395 F2d 47, 53.

[30] *United States* v. *Battaglia* (7th Cir., 1968), 394 F2d 304, 315.

testimony exists for possible use in impeachment. Counsel for Tocco calls our attention to second circuit decisions which have been critical of "excessive" use of hearsay in seeking indictments[31] and have at least suggested that indictments may in the future be dismissed "without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury." [32] Counsel does not ask dismissal here, but asks that we hold that a government witness who has been "insulated against impeachment" by not being called before the grand jury is an incompetent witness. We are not persuaded to attempt to formulate a general rule in this area, and nothing peculiar to the case before us appears to call for such holding in this instance.

(3) *"Secret" numbers.*

Hopkins, an agent of the National Automobile Theft Bureau, testified that he examined a Cadillac and found that the numbers on the door plate, the "public" frame location, and the engine block were the same; but the "secondary" number on the frame was different. Evidently the secondary number is known only to the manufacturer and persons concerned with identification of vehicles for insurance and enforcement purposes, such as Hopkins. Defense counsel inquired about the location and the court sustained an objection. The court denied a motion to strike Hopkins' testimony.

---

[31] *United States* v. *Umans* (2d Cir., 1966), 368 F2d 725.

[32] *United States* v. *Arcuri*, (2d Cir., 1968), 405 F2d 691, 694, affirming 282 FSupp. 347. See also *United States* v. *Borelli* (2d Cir., 1964), 336 F2d 376; *United States* v. *Catino* (2d Cir., 1968), 403 F2d 491, 496; and *United States* v. *Beltram* (2d Cir., 1968), 388 F2d 449.

Requiring an answer would have destroyed the effectiveness of a device which is useful in the public interest, and the value of an answer was speculative. In our view, the district judge did not abuse his discretion.

(4) *Use of prior consistent statements.*

Tocco argues that there were two instances of use by the government of prior statements by a government witness to corroborate trial testimony or in lieu of it. It is not clear that Tocco correctly characterizes what happened. Error, if any, was insignificant.[33]

VI. IATAROLA'S CLAIM: INSUFFICIENCY OF EVIDENCE.

Iatarola operated Rocket Service Center in Gary, Indiana, an agency for new and used automobiles, and service department. At least five automobiles involved in transaction counts passed through his hands, but he argues the evidence does not prove his guilty knowledge or his participation in the conspiracy. His testimony at trial tended to place any criminal responsibility on Philip Raschke, a government witness, who was also involved in the sales of these cars. The jury could properly believe Raschke's version.

Six Cadillacs, stolen in Illinois from February 1, 1964 to February 1, 1965 were transported to Gary, and the jury found Herman guilty of transporting each, except one stolen August 2, 1964 (count 22). Iatarola sold one of these cars to an Indiana customer and no interstate transportation resulted. Five were sold to a Missouri

[33] See, however, *United States* v. *Lewis* (7th Cir., 1969), 406 F2d 486, 492. See also *California* v. *Green*, June 23, 1970, 38 L. W. 4579.

dealer named Kelly, three on November 28, 1964 and two on March 26, 1965. The jury apparently thought one of the cars sold in March belonged to and was sold by Raschke and they found Iatarola not guilty as to it, guilty as to all others. Four of the cars as to which Iatarola was found guilty and the one he sold in Indiana were sold along with spurious Indiana titles from the same source as the titles of the Tocco car and three Nasse cars. All bore serial plates taken from other cars. Hager testified that he and Buonomo had stolen two of the cars and turned them over to Herman before they reached Iatarola.

In addition to the inferences as to knowledge and participation which may be drawn from the transactions just mentioned, there were additional facts from all of which we conclude the jury could properly find that Iatarola was guilty rather than an innocent associate of Raschke.

Hager testified that in September, 1965, he accompanied Herman on a visit to Iatarola. There had been some trouble about two hot cars and Herman had taken them home. Iatarola told Herman that if Iatarola didn't get his money back, he was going to put the finger on Herman and his partner. Herman promised that Iatarola would get his money when the cars were sold.

Iatarola testified that he knew Herman as a service customer and saw him about once a month. But telephone records showed two to ten calls a month from Herman to Iatarola. The telephoning increased around the time when Kelly discovered he had purchased stolen cars and made complaints.

Iatarola admitted that he had denied to an FBI agent that he had sold any cars to Kelly.

VII. MISCELLANEOUS OTHER CLAIMS.

(1) Each defendant claims it was an abuse of discretion to deny him severance and to deny mistrials on similar claims of prejudice by being tried with the others.

The principal complaint of several defendants arises from testimony of threats by one or the other of the Davids to hold other conspirators in line or to suppress testimony. We are satisfied, however, that there was no abuse of discretion and that each had a fair trial. The verdicts indicate a careful evaluation of the evidence by the jury, acquitting three defendants entirely and acquitting Herman, Bob, Joe, and Iatarola on certain counts where there may have been room for doubt.

(2) Various claims that additional instructions should have been given, that instructions should have been differently phrased, and other claims of error have been considered, but do not require detailed treatment. We find no merit.

The judgments are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Monday, November 2, 1970

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER Circuit Judge
Hon. JESSE E. ESCHBACH, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 16461 vs.

ALBERT TOCCO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a reeharing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.